IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-478

PARKER SEAL COMPANY, - - - **Petitioner**

versus

PAUL CUMMINS, - - - - - **Respondent**

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 13a) is reported at 516 F. 2d 544. The opinion of the District Court (Pet. 7a) is unreported. The opinion of the Kentucky Commission on Human Rights (Pet. 1a) is unreported.[1]

JURISDICTION

Judgment was entered by the Sixth Circuit Court of Appeals on May 23, 1975 (Pet. 59a). Petition for Rehearing was denied July 18, 1975 (Pet. 61a). Peti-

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[1] "Pet" refers to Parker Seal's petition for certiorari. "R" refers to the single appendix filed herewith.

tion for certiorari was filed September 25, 1975 and granted on March 1, 1976 (R. 246). Jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Guideline Involved

The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Section 703(a)(1) of the Civil Rights Act of 1964, as amended, provides:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. §2000e-2(a)(1) (1974).

Section 701(j) of the Civil Rights Act of 1964, as amended, provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j) (1974).

Guideline 1605.1 of the United States Equal Employment Opportunity Commission provides:

"(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds required by Section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) the Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the varied religious practices of the American people." 29 C.F.R. §1605.1 (1975).

QUESTIONS PRESENTED

Title VII of the 1964 Civil Rights Act, as amended, and the E.E.O.C.'s "religious accommodation" guidelines promulgated thereunder, require an employer to "reasonably accommodate" the religious beliefs of an employee unless such accommodation would impose an "undue hardship" on employers' business.

1. Whether the 1972 "Religious Accommodation" Amendment and EEOC 1967 Guideline violate the Establishment Clause of the Constitution.

2. Whether the Court of Appeals correctly held that the employer did not meet its burden of showing that it was unable to reasonably accommodate the employee without undue hardship.

COUNTER STATEMENT OF THE CASE

Paul Cummins was employed by the Parker Seal Company at its Berea, Kentucky, plant on December 9, 1958 (R. 53). In May of 1965 he was promoted to supervisor of the Banbury (rubber mixing) department and continued in that salaried management (non union) classification until he was fired by Parker Seal on September 3, 1971 (R. 55-56). His regular work shift was the first shift, *i.e.*, from 7:00 A. M. to 3:00 P. M., Monday through Friday, but he was not required to punch a time clock and was expected to be on call if needed (R. 78).

In April 1969, Cummins began to attend the World Wide Church of God with his family and became a member of that church in September 1970 (R. 61).

The World Wide Church of God observes the period from sunset Friday to sunset Saturday as the Sabbath and its members honor this period by abstaining from their regular labors and by attending religious services. Certain designated "Feast days of God" which occur throughout the calendar year are also observed in the same fashion.

When Cummins began observing the Sabbath in July 1970, he advised the Parker Seal plant manager, Conley Saylor, that he could not work on the Sabbath or annual holy day, but he would work at any other time (R. 64-65). From that time forward Cummins did not work on Saturdays.

Actually, Saturday work was overtime (time and a half) for hourly workers and was only scheduled when necessary, which was perhaps one-half of the Saturdays in 1971 (R. 173).

The new plant manager who replaced Conley Saylor in November 1970, L. G. "Dutch" Haddock, was not aware that Cummins was not working on Saturday until the summer of 1971. He did not discuss the matter with Cummins until July or August 1971 when the heavy vacation schedule in the Stock Prep Department caused Cummins' Saturday absence to become a problem and to be brought to his attention (R. 173-175).

Haddock's superior, Roy Kuhn, took a special interest in the Berea plant beginning in October 1970 and spent a whole month in the plant covering all three shifts in December 1970 (R. 210) but did not learn that the Banbury supervisor (Cummins) was

not working on Saturday until he was advised by Haddock in July or August 1971 (R. 231-232).

The reason that Haddock replaced Saylor and Kuhn took such an interest in the operation of the Berea plant was that the profitability of the Berea plant declined steadily beginning in 1968 and through early 1970 (R. 207). One of the reasons for this decline was the general economic picture in our whole economy (R. 209). This was during the time that Cummins was working Saturdays and holy days, before he became a member of the Church, and before he excluded himself from the possibility of work from sundown Friday to sundown on Saturday. In spite of Parker Seal's protestation and implications to the contrary, the plant manager stated unequivocably that there was "nothing related to Paul's situation" (R. 131). Cummins did a very adequate job (R. 119) and was one of the stronger foremen (R. 222).

Further, it had been company practice for years, for economic reasons to operate a second shift (and sometimes a third shift) at Banbury without a foreman (R. 117-118, 130). This practice has continued well after Cummins was terminated (R. 219-220).

Although Cummins received very little guidance or assistance from his supervisors relating to his new work situation which began in July 1970, Cummins did volunteer to work and did work for other employees (R. 67, 99, 141-142, 153).

The morale problem of which Parker Seal complains did not really begin until the summer of 1971

with vacation scheduling—an obviously temporary situation (R. 175).

The company response to this morale problem created by heavy vacation schedules was to ask Cummins to change his religious ideas (R. 178). Cummins was terminated for refusing to work on his Sabbath (R. 71-72, 179-181).

PROCEEDINGS BELOW

Following his discharge on September 3, 1971, Cummins filed charges of unlawful discrimination with both the Kentucky Commission on Human Rights (KCHR) and the E.E.O.C. (R. 6).

The KCHR conducted a complete evidentiary hearing in Richmond, Kentucky, on March 3, 1972. The complete record of that hearing is contained in the appendix (R. 21-241) and the parties have stipulated that factual record for purposes of the action in Federal Court filed on September 26, 1972 (R. 242-245).

Both the KCHR and the District Court ruled in favor of Parker Seal. The decision of the District Court was conclusionary and stated no facts in support of the conclusion that undue hardship had or would result. The Court of Appeals for the Sixth Circuit felt compelled to carefully review the entire factual record and concluded (1) that mild and infrequent complaints of fellow employees because of Cummins' refusal to work on Saturday do not amount to undue hardship on conduct of employer's business, and (2) Parker Seal

might have alleviated some of the dissension if it had pursued a more active course of accommodation. *Cummins* v. *Parker Seal Company,* 516 F. 2d 544, 550 (6th Cir. 1975).

In addition to ruling that the factual record did not support the District Court decision, the Court of Appeals held that Section 701(j) of Title VII, 42 U.S.C. §2000e(j), is not inconsistent with the establishment clause of the First Amendment to the Constitution. 516 F. 2d at 554. Judge Celebrezze dissented on the basis of his belief that there is a "wall of separation between Church and State erected by the First Amendment" and that both the statute and the E.E.O.C. Guidelines breach that wall and have effected an establishment of religion. Apparently, Judge Celebrezze conceded that the case could not be decided in favor of Parker Seal on the facts or he would not have felt compelled to reach the constitutional issue. 516 F. 2d at 555.

ARGUMENT

SUMMARY

The "religious accommodation" provisions of Title VII require an employer to show that "undue hardship" results before he is allowed to compel an employee to violate his religious principles. An employer may not apply a rule or condition of employment, though neutral on its face, if said rule or condition, has

the effect of discriminating against an employee because of his religion without a showing of undue hardship.

The "reasonable accommodation" provision meets the tripartite test in that its purpose and effect are secular and it does not foster an excessive entanglement between religion and government.

The Sixth Circuit correctly held that the employer failed in its obligations to "reasonably accommodate" the employee and rather attempted to shift the burden to the employee. The employer forced the employee to choose between his religion and his job. The Court further correctly held mild and infrequent complaints of other employees do not constitute "undue hardship" within the meaning of 42 U.S.C. 2000(e)j (1974).

I. The 1972 "Religious Accommodation" Amendment and E.E.O.C.'s 1967 Guideline do Not Violate the Establishment Clause of the First Amendment.

As will be developed, it is obvious that the "religious accommodation" provisions of Title VII, do not violate the Establishment Clause of the First Amendment but rather fulfill a valid congressional goal—the elimination of discrimination in employment based on religion.

The purpose of the 1972 Amendment was clarification by Congress that a person's religious beliefs and practices should not be a factor in the area of employment.

The amendment is not rigid and is a proper balance between the rights and duties of the employer and the employee.

The "accommodation" provision is the very heart of the ban on religious discrimination.

A. THE BACKGROUND OF SECTION 701(j) OF THE CIVIL RIGHTS ACT.

Congress focused its primary attention on the problem of race discrimination when it considered Title VII of the 1964 Civil Rights Act. There is scant legislative history concerning the inclusion of religious discrimination in the proscribed employment practices, and what can be found is not illuminating.

It seems clear, however, that Congress included religion as a proscribed factor in employment decisions because the fair employment acts of several states, which Congress used as models, typically declared discrimination based on race, color, *religion,* or national origin unlawful. The inclusion reflects a recognition that the exercise of religious freedom in the United States has always been considered a fundamental right which lies at the heart of a free society.[3]

In 1966 the United States Equal Employment Opportunity Commission issued Guidelines which were intended to give meaning and substance to the proscription of religious discrimination contained in Section 703(a)(1) of Title VII.[4] After a year's experience

[3]Edwards & Kaplan, "Religious Discrimination and the Role of Arbitration Under Title VII," 69 *Mich. L. Rev.* 599, 602 (1971).

[4]E.E.O.C. Guidelines on Discrimination Because of Religion, 31 Fed. Reg. 8370 (1966).

with these Guidelines, the E.E.O.C. issued new guidelines on July 10, 1967, which included the obligation on the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business.[5]

These guidelines were extensively litigated in *Dewey* v. *Reynolds Metals Co.* In three separate opinions the District Court ruled in favor of Dewey.[6] The Court of Appeals for the Sixth Circuit reversed, holding *inter alia,* that Ttitle VII did not ban facially neutral employment practices which had the effect of terminating Dewey's employment because of his religious beliefs and practices.[7] The Supreme Court affirmed this decision in a four to four vote.[8]

Thus, the validity of the 1967 E.E.O.C. Guidelines was questionable in 1972. Further, the Court had decided *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), which held, *inter alia:*

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer

[5]E.E.O.C. Guidelines on Discrimination Because of Religion, 29 C.F.R. §1605.1.

[6]291 F. Supp. 786 (W.D. Mich., 1968); 300 F. Supp. 709 (W.D. Mich., 1969); and 304 F. Supp. 1116 (W.D Mich., 1969).

[7]429 F. 2d 324 (6th Cir., 1970).

[8]402 U. S. 689 (1971).

the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U. S. 431-432.

From 1971 to the present there have been two possible interpretations of the meaning of religious discrimination under Title VII. First, Title VII prohibits an employer action or rule that is otherwise neutral on its face, such as a requirement that all workers must work on Saturday, if the action is not uniform in its impact on employees holding differing religious beliefs unless the employer can prove "business necessity.[9] Second, Title VII prohibts a neutral-on-its-face employment practice which has a discriminatory impact on employees holding differing religious beliefs, but allows for exculpation (1) if the employer has made an effort reasonably to accommodate the religious needs of the employee, or (2) if an accommodation cannot be made without undue hardship to the employer.

Congress enacted Section 701(j)[10] in 1972 in answer to the uncertainty created by the *Dewey* decisions. Senator Randolph added this section to show that Congress did intend to require of employers' the reasonable accommodation required by the 1967 E.E.O.C. Guidelines. He placed in the Congressional Record copies of the Sixth Circuit *Dewey* decision and a District Court

[9]This burden is great. *See Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 798 (4th Cir. 1971); *U. S.* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 662 (2d Cir. 1971) ("necessity connotes an irresistible demand").

[10]12 U.S.C. §2000e-(j) (March 24, 1972).

opinion unfavorable to an employee's exercise of his religious beliefs.[11]

Without the E.E.O.C. Guidelines and Section 701(j) employers would not now be free to discriminate on the basis of religion so long as their actions are not based on an intention to discriminate. Clearly, requiring employers to reasonably accommodate religious needs, unless the accommodation places undue hardship on the conduct of the employer's business, is a less onerous and burdensome standard than requiring an employer to demonstrate that a policy or practice is dictated by business necessity.

B. THE RELIGIOUS ACCOMMODATION PROVISION RENDERS "RELIGION" A NEUTRAL FACTOR IN EMPLOYMENT.

There are basically two levels of discrimination. The first level is the blanket rejection of a job-seeker because of that person's race, color, *religion* or national origin.

The company does not contend, nor does Judge Celebrezze in his dissent, that Congress diid not have the authority to outlaw discrimination on this level (Pet. brief at page 40; 516 F. 2d at 559-560).

However, they then contend that Congress does not have the power to outlaw discrimination on the second level—the practice of one's religion.

Religiously based activities can be protected by the First Amendment and in this instance by Congress. *Wisconsin* v. *Yoder,* 406 U. S. 205 (1975); *Sherbert* v.

[11]118 Cong. Rec. 706-13 (1972) (remarks of Senator Randolph).

Verner, 374 U. S. 398 (1963); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

By rejecting the "reasonable accommodation" provision the Court would be exempting religious discrimination from *Griggs.*

If ever there is a clear application of *Griggs,* the area of religious discrimination is it.

However, Congress has relieved the employer of the heavy burden of *Griggs* in religion cases. He is only required to "reasonably accommodate" and even then only "without undue hardship on the conduct of (his) business" 42 U. S. 2000e(j) 1974.

Congress has not written an absolute. It has created a balancing factor. The wishes of the employee are not always followed. *E.g., Williams* v. *Southern Union Gas Co.,* 529 F. 2d 483 (10 Cir. 1976), *cert. pending,* No. 75-1511 or *Reid* v. *Memphis Pub. Co.,* 521 F. 2d 512 (6th Cir. 1975), *cert. pending* No. 75-1105.

C. THE 1972 AMENDMENT AND 1967 GUIDELINE MEET THIS COURT'S TRIPARTITE ESTABLISHMENT CLAUSE TEST.

What little benefit that accrues to individual churches is incidental and is certainly not the type prohibited.

> "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment of a religion connoted a sponsorship, financial support, and active involvement of the sovereign in religious activities. *Walz* v. *Tax Commission,* 397 U. S. 664, 701 (1970). See also *Engel* v. *Vitale,* 370 U. S. 421 (1962).

There will always be an incidental benefit to religion whenever Congress or the states act in this area. *E.g. Tilton* v. *Richardson,* 403 U. S. 672 (1971); *Everson* v. *Board of Education,* 393 U. S. 97 (1968); *Board of Education* v. *Allen,* 392 U. S. 236 (1968).

However the First Amendment "does not say that in every and all aspects there shall be a separation of Church and State." *Zorach* v. *Clauson,* 343 U. S. 306, 312.

It may well be that Senator Jennings Randolph when he sponsored the 1972 amendment felt that it would help his own religion. It could be just as easily argued that failure to enact the amendment would violate the other provision of the First Amendment *i.e.,* the prohibition "of the free exercise thereof. . . ."

In eliminating discrimination based on religion, Congress looked to the facts to see how people were being discriminated against. This is not impermissible and is in fact preferable in our system.

As stated by Mr. Justice Douglas in *Zorach:*

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." 343 U. S. at 314.

1. Purpose.

This Court just recently restated this test in *Roemer* v. *Board of Public Works of Maryland* —— U. S. ——, 44 L. W. 4939, 4943 quoting *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971):

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster 'an excessive government entanglement with religion'." 403 U. S. at 612-613.

Accord, Meek v. *Pittenger,* 421 U. S. 349, 358 (1975); *Committee for Public Education* v. *Nyquist,* 413 U. S. 756, 772-3 (1973); *Tilton* v. *Richardson,* 403 U. S. 672, 678 (1971).

The purpose of the "religious accommodation" amendment is to insure that a person is not discriminated against because of the practice of his religion. The purpose behind Title VII was to see that the job market was not restricted to persons because of their religion, among other things.

The area in which Sabbatarians need to be protected is in their right to freely exercise their beliefs.

"The freedom to believe and to practice strange and, it may be foreign creeds, has classically been one of the highest values of our society." *Braunfield* v. *Brown,* 366 U. S. 599 (1961) (Brennan, J. dissenting); *c.f. Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943); *Jones* v. *Opelika,* 319 U. S. 103 (1943); *Martin* v. *Struthers,*

319 U. S. 141 (1943); *Follett* v. *McCormick,* 321 U. S. 573 (1944).

Congress intended to remove a barrier that favored a group of employees over others. *Griggs, supra* at 430.

Congress wanted to eliminate the situation where an employee was forced to abandon "one of the precepts of" his "religion in order to accept work. . . ." *Sherbert* v. *Verner,* 374 U. S. 398, 404 (1963).

Interestingly, Parker Seal and Judge Celebrezze seem to feel that the prohibition against religious discrimination would still help the Sabbath observer if he could show that "similarly situated employees were not required to work on Saturdays." 516 F. 2d at 559-560. That of course overlooks the obvious. Other employees would not have the objection to working on Saturdays that Sabbatarians would, any more than Cummins would have objected to working on Sundays.

The Congress established the public policy of the United States in 1964 that certain forms of discrimination, *i.e.,* discrimination because of race, color, *religion,* sex and national origin should be unlawful because such discrimination denies individuals equal employment opportunity and the nation the full productive capacities of its citizens.

The right to employment is extremely important in our society. The Supreme Court recognized the value of this right many years ago in *Truax* v. *Raich,* 239 U. S. 33, 41 (1915):

> "It requires no argument to show that the right to work for a living in the common occupations of

> the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

If men and women are to be terminated from employment because their religious beliefs do not allow them to work on Saturdays, then a substantial minority segment of the nation's work force will be denied the opportunity to compete as equal job competitors with those individuals who subscribe to majoritarian religious belief and practice. Unless some effort is made to accommodate these religious practices, there will be the discrimination on the basis of religion which Section 703(a) of Title VII was enacted to prevent.

Unquestionably, by attacking the evil of discrimination, because of religion in employment, Congress has acted to facilitate the free exercise of religion.

The burden, it it is a burden, on employers to cease discriminating on the basis of religion was placed on them by enactment of Section 703(a) of Title VII effective July 2, 1965, and was not placed there by any E.E.O.C. Guideline or the enactment of Section 701(j) of Title VII effective March 24, 1972.

2. Effect.

The second part of the test is that the questioned provision not have a "primary effect" that neither advances *nor* inhibits religion."

". . . Whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to pre-

vent." *Abington School District* v. *Schempp,* 374 U. S. at 236 (Brennan, J. concurring).

Here there is not the forbidden effect on religion. *McCollum* v. *Board of Education,* 333 U. S. 202 (1948); *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). There is nothing in Title VII which involves government "in the essentially religious activities of religious institution." *Lemon* v. *Kurtzman,* 403 U. S. at 658 (Brennan, J. concurring).

And it is clear that, "not every law that confers an 'indirect,' 'remote' or incidental benefit upon religious *institutions* is, for that reason alone, constitutionally invalid." (Emphasis added.) *Nyquist, supra,* 413 U. S. at 771. *See also Roemer* v. *Board of Public Works of Maryland,* 44 L.W. 4939 (1976); *Tilton* v. *Richardson, supra; Walz* v. *Tax Commission, supra.*

There is no "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz, supra,* 397 U. S. at 668.

The "religious accommodation" does not aid "all religion against non-believers." In fact, the provisions have been held to apply to atheists—as well they should. *Young* v. *Southwestern Savings and Loan Assn.,* 509 F. 2d 140 (5th Cir., 1975).[12]

Government is neither theocratic nor antagonistic to religion. It is neutral but takes cognizance of the nature of the people.

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[12] "Congress, through Title VII, has provided the Courts with a means to preserve religious diversity from forced religious conformity." *Supra,* 509 F. 2d at 141. Thus an atheist could not be compelled to attend a devotional service. Obviously, the "religious needs" of an atheist are less than that of a believer, but that is a choice on their part.

> "For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion to those who do believe. *Zorach, supra,* 343 U. S. at 313-314.

The effect of the accommodation is so remote as to be *de minimus.* The primary benefit (that is, being free from employment discrimination) accrues to *individuals* and not any religious organizations. This type of "aid" has been upheld by this Court repeatedly. E.g. *Everson* v. *Board of Education,* 330 U. S. 1 (1947). School bus transportation for parochial students; *Board of Education* v. *Allen,* 302 U. S. 236 (1968) textbooks given to parochial students.

As stated in *Sherbert* v. *Verner, supra,* 374 U. S. at 412: "Payments will be made to her not as a Seventh Day Adventist, but as an unemployed worker."

The primary effect of the provision requiring an accommodation is simply to insure that each individual employee will be, to the greatest extent possible, treated identically with every other employee. It insures that the plaintiff's religion does not function to penalize his employment opportunities. Title VII attacks discrimination rather than fosters religion.

Since we do live in a society that generally acknowledges Sunday as the Sabbath, Saturday Sabbatarians are placed at a disadvantage. *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Gallagher* v. *Crown Kosher Market,* 366 U. S. 617 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U. S. 582 (1961).

The fact is that Parker Seal, like most companies, schedules any additional work on Saturdays not Sundays (R. 135).

The company has decided within the framework of a predominantly Christian Sunday-Sabbath oriented society that it would not work on Sundays but rather on Saturdays if one extra day was needed for production. (See *McGowan, supra,* 366 U. S. at 56, Douglas, J. dissenting).

This accommodation only restricts an employer as regards to individual employees—and that is not an absolute restriction.

As the Sixth Circuit stated:

> "Surely this constitutes a lesser interference with the rights of the employer than does a law requiring the employer to close his business entirely." *Cummins* v. *Parker Seal Co., supra,* 516 F. 2d at 554.

By not requiring an accommodation, Congress would be perpetuating an inequity against Sabbatarians and failing in their duty to protect religious freedom.

> "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale,* 370 U. S. 421, 431.

Parker Seal seems to ignore this Court's pronouncement in *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972) where a *particular* religious sect was exempt from a state compulsory education law.[13]

There the statute applied to all, as does *Parker Seal's* Saturday work rule, however in *Yoder* the Court said:

> "A regulation neutral as its face may, in its application nevertheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." 406 U. S. at ——.

The company further skims over this Court's ruling in *Sherbert* v. *Verner, supra,* since that case was brought under the Fourteenth Amendment. This, if Cummins had been employed by a governmental agency he would have protected prior to the enactment of Title VII. What Congress did with the enactment of Title VII was in effect to apply the Fourteenth Amendment standard, to private employees of private employers.

This is certainly nothing new and this term the Court ruled that Congress could do so in outlawing racial discrimination in private schools. *Runyan* v. *McCrary* —— U. S. —— 44 L.W. 5034 (June 25, 1976). See also: *Jones* v. *Mayer,* 392 U. S. 409 (1968) and *Tillman* v. *Wheaton-Haven Recreation Assn.,* 410 U. S. 431 (1973).

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[13]The Court further noted that there is a specific governmental pronouncement, 26 U.S.C. §1402(h) that exempts the Amish from the payment of Social Security taxes.

If Congress can extend the coverage of 42 U.S.C. §1981 and 42 U.S.C. §1982 to cover private contracts it can extend the protection of the Constitution to safeguard religious practices.

As stated by Chief Justice Burger in *Nyquist, supra,* 413 U. S. at 82:

> "The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."

3. Entanglement.

This Court dealt with several types of cases involving "excessive entanglement" of government in religion.

Many of these relate to monitoring or auditing financial aid. E.G. *Roemer* v. *Board of Public Works of Maryland, supra; Tilton* v. *Richardson, supra;* and *Hunt* v. *McNair, supra.* See also *Lemon* v. *Kurtzman, supra,* 403 U. S. at 617-618 where religion "pervaded the school system" and "(R)eligious formation is not confined to formal courses, nor is it restricted to a single subject area."

Others relate to sincerity of belief. *Welsh* v. *United States,* 398 U. S. 333, 370 (1970) White, J. dissenting: "The Court could as Congress has done exempt religious objectors to wars. And such an exemption would

be no more an establishment of religion than the exemption required for Sabbatarians in *Sherbert* v. *Verner,* 374 U. S. 398 (1963). And *Gillette* v. *United States,* 401 U. S. 437 (1971); *Wisconsin* v. *Yoder, supra,* 406 U. S. at 216 ". . . it is not merely a matter of religious preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."

And of course, *Walz* v. *Tax Commission, supra,* where government is required to intimately analyze a religious organization to determine its eligibility for tax-exempt status.

Thus the test is that of "excessive entanglement." In a Title VII case one has to stretch to see any entanglement caused by the "reasonable accommodation" provision.

Since "religious discrimination" is already outlawed then obviously the religion of the person filing a complaint with E.E.O.C. is pertinent. Secondly, the beliefs of that religion need to be known for any reasonable understanding of the alleged discrimination. Rarely, if ever, does the issue of sincerity arise. (E.g. *Cummins* v. *Parker Seal Co., supra; Hardison* v. *Trans World Airlines, Inc.,* 527 F. 2d 33 (8th Cir. 1975), cert. pending No. 75-1126; *Young* v. *Southwestern Savings and Loan Assn., supra.*

Any involvement the government has in Title II religion cases is peripheral and mandated by the Congressional deserve to outlaw religious discrimination in employment.

What entanglement there is for a secular purpose—to see if the law is being complied with.

General supervision by the state, in the area of religion has never been proscribed. (E.g. *Zorach, supra* and *Roemer, supra.*)

In dissent, Judge Celebrezze laments that the "wall" between Church and State has been breached. *Cummins, supra,* at 555.

This Court has recognized that there is no wall but rather "a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman, supra,* 403 U. S. at 614.

It is blurred because each case stands alone. Here Congress is extending the Constitutional right to freely exercise one's religion to the private sector. This is no more unconstitutional than to exempt Sabbatarians from Sunday closing laws. *Braunfeld* v. *Brown,* 366 U. S. 599, 614 (1961) Brennan, J. dissenting.

The freedom to practice one's religion is not absolute. *Reynolds* v. *United States,* 98 U. S. 187 (1878); *Prince* v. *Massachusetts,* 321 U. S. 158 (1944); nor should it be.

Government should not take a hostile attitude toward religion because there are "unavoidable accomodations necessary to achieve the maximum enjoyment of each and all of them . . ." *Abington School District, supra,* 374 U. S. at 306, Goldberg, J. concurring.

Here Congress has given a clearly defined accommodation. A "reasonable accommodation" that does not cause an "undue hardship" on the employer's busi-

ness. It is not an absolute. Congress does not require every employer to accommodate every employee because of his religion. Congress did not give an employee an unfettered right to exert his religious beliefs.

An individual's religious beliefs must give way to an employer's needs. An employee's beliefs and practices must give way if an employer can demonstrate said practices are unreasonable or that the practices will do "undue hardship" to the employer. It is a practical statute designed to allow for the religious diversity for which our forefathers fought, while, at the same time, allowing employers to compete in the business world.

II. The Court of Appeals Correctly Held That Parker Seal Did Not Meet Its Burden of Showing That They Were Unable to 'Reasonably Accomodate' Cummins Without Undue Hardship.

The company righteously contends that it fulfilled its obligation to Cummins because it accommodated him for over a year and that now that gratuitous accommodation has been used against them by the Court of Appeals.

The fact of the matter is that Cummins' supervisor became *aware* that he was not working on Saturdays in the summer of 1971 and he was terminated in September of 1971 (R. 1973). And then the problems were basically occasioned by vacation scheduling (R. 175).

The Court of Appeals correctly found that Cummins "was discharged because his refusal to work on Saturday was causing considerable consternation and

problems with the rest of our employees who were being required to work a full shift." *Cummins, supra,* 516 F. 2d at 550 (R. 231).

This "grumbling" or irritation is not unusual.[14]

In fact, about the only worth in detailing the other cases is that it exemplifies the theory that in the area of reasonable accommodation each case must stand on its own facts. Thus, in one instance a demotion may be a reasonable accommodation (E.g. *Dixon* v. *Omaha Public Power Dist.,* 385 F. Supp. 1382 (D. Neb. 1974); whereas in another factual setting a demotion or downgrade is not a reasonable accommodation, e.g. *Ward* v. *Allegheny Ludlum Steel Corp.,* 397 F. Supp. 375 (W.D. Pa. 1975), appeal pending (3rd Cir.).

There is really no comparison between the permanent accommodation of a foreman as in *United States* v. *City of Albuquerque,* 9 E.P.D. 10, 182 (C.D. Cal. 1975) and the once-a-month accommodation of a minister from a factory job as in *Weitkenaut* v. *Goodyear Tire & Rubber Co.,* 381 F. Supp. 1284 (D.Ut. 1974).

Here the Sixth Circuit found that the District Court committed errors of law in its application of the facts. The company does not contend that the Court is misstating the facts.

There is no question why Cummins was fired because his religion did not permit him to work on Saturdays (R. 230-231).

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[14] *Draper* v. *United States Pipe & Foundry Co.,* 527 F. 2d 515 (6th Cir. 1975) and *Hardison* v. *Trans World Airlines, Inc.,* 527 F. 2d 33 (8th Cir. 1975) cert. pending, No. 75-1126.

The only "undue hardship" the company can point to is the morale problem. This, of course, was specifically rejected by the Sixth Circuit as well as the Eighth (Hardison, *supra*).

The company mistakenly feels that the burden of accommodation is shared equally by the employer and employee alike, however Section 701(j) states, in part

> "unless an *employer* demonstrates that he is unable to reasonably accommodate . . ."

Although the factual record shows that Cummins did volunteer and the Circuit Court so found, the company seems to ignore that fact. (Compare Pet. brief, p. 46 and *Cummins, supra,* at 546, R. 115.)

An employer cannot be said to be fulfilling its duty by shifting it back to the employee.

Cummins never took an "intransigent position." E.g. *United States* v. *City of Albuquerque,* 9 E.P.D. 10, 182 at 7825, 7830 (C. D. Cal. 1975). He obviously wanted to keep his job but at the same time practice his religion.

The company constantly refers to what Cummins failed to do. What is important is what the company failed to do.

They never offered him a transfer.

They never offered him a different job.

They never told him they would have to reduce his pay commensurate with his reduced work load.

They didn't assign him to non-Sabbath work.

The terms they offered were so vague as to be nonexistent. The company was forcing him to justify his religion to the other employees who were disgruntled.

Other employees worked on their Sabbaths. Obviously, they felt that they could maintain the precepts of their chosen religion and work on their Sabbath. Cummins could not. That is why Congress added the 1972 amendment to Title VII—to protect the Paul Cummins'. Congress wanted to eliminate the situation, as much as possible when an employee would have to choose between his religion and his job.

Instead of dealing with the real problem—the dissatisfaction of other employees—the company simply terminated Cummins.

Congress used the words "undue hardship." Obviously, that is more than mere hardship. The Sixth Circuit called the situation an "inconvenience", *supra*, at 550.

If this situation were to be construed as an undue hardship then it would be difficult to perceive what facts would not constitute such.

The company details numerous broad instances where a reasonable accommodation arguably could not be made. Obviously, that situation exists—but not here. The Court below found so.

Regardless of all that is said by the company, they can accommodate because they did accommodate. The only problem arose, during a temporary vacation sitnation and the employees' grumbling was related to general working conditions rather than Cummins' situation.

The company somehow seems to feel that as long as its policy was uniformly applied, it was valid.

The Kentucky Commission on Human Rights adopted that reasoning (Pet. 5a). Presumably the District Judge did also. Of course, that is not the law as stated in *Griggs*.

> "But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Supra*, 401 U. S. at 423.

There can be little doubt that the policy of Parker Seal had the effect of discriminating against Cummins. This fact has not been challenged by the company. The only question which remains is whether the "business necessity" of the Defendant is sufficient to overcome the manifest public policy of non-discrimination.

Policies which have a discriminatory effect are seldom sustained. *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969) Cert. denied, 397 U. S. 919 (1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970); *United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F. 2d 144 (6th Cir. 1970), *Cert. denied*, 400 U. S. 943 (1970) (Race) and *Weeks* v. *Southern Bell Telephone & Telegraph Company*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate Palmolive Company*, 416 F. 2d 711 (7th Cir. 1969); *Cheatwood* v. *South Central Bell Telephone & Telegraph Company*, 303 F. Supp. 754 (D.C. Ala. 1969) (Sex).

Thus the Courts have uniformly held that, when the discriminatory effect is established, the burden shifts to the employer to prove that the policy is necessitated by business considerations. This the company utterly failed to do—or even attempt to do. The only attempt on their part to resolve the conflict was to attempt to get Cummins to change his religion.

As the language of the 1976 amendment makes clear, religious discrimination must be considered on a case by case basis. In practically every case, however, there will be some form of employee dissatisfaction and/or dissension.

Employee dissatisfaction cannot be accorded the status of an overriding legitimate business purpose. There must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish the purpose equally well without firing Cummins. *Robinson* v. *Lorillard Corporation*, 444 F. 2d 791, 798 (4th Cir. 1971).

Parker Seal made no effort to determine if other actions could have been taken by management which would have alleviated the situation. Parker Seal assumed that it had only two choices, i.e., fire Cummins or get him to change his religion.

Parker Seal failed to meet its affirmative obligation imposed on it by Congress and consequently is guilty of discriminating against Paul Cummins because of his religion.

CONCLUSION

For the foregoing reasons, Paul Cummins, Respondent, submits that the decision of the Sixth Circuit of Appeals is correct and should be affirmed in all respects.

Respectfully submitted,

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